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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE TERRITORY OF GUAM

12 UNITED STATES OF AMERICA,)	Criminal Case No. 17-00020
13 Plaintiff,)	
14 v.)	MOTION FOR JUDGMENTS
15 MARK S. SMITH,)	OF ACQUITTAL, NEW TRIAL,
16 Defendant.)	AND TO ARREST JUDGMENT

17
18 COMES NOW, defendant Mark S. Smith, by and through undersigned
19 counsel, and moves this Honorable Court for an Order granting judgments of acquittal, a
20 new trial, and arrest of judgment on all counts. *See* Fed. R. Crim. P. 29, 33, 34.

21 Respectfully submitted,

22 *s/Benjamin L. Coleman, s/Michael F. Phillips*

23 Dated: April 12, 2022

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INTRODUCTION

Throughout these proceedings, one of the prosecutor's refrains has been, "this is not a criminal conflict of interest case." Tr. 3265 (Dec. 3, 2021); *see* Tr. 5 (Nov. 2, 2021).¹ While somewhat misleading given the centrality of the conflict of interest question in this prosecution, the bigger problem with the prosecutor's point is that it begs the question: What type of criminal case is it? More specifically, is this a property fraud case, or is it an honest services fraud case?

The answer is that the government charged *property* fraud under 18 U.S.C. § 1343, *not* honest services fraud under 18 U.S.C. § 1346. But, to use another one of the prosecutor's tag-lines, the government has improperly tried to "double-dip." Tr. 7 (Nov. 12, 2021). Indeed, it has dipped back and forth between the different theories of fraud (and still other theories not charged in the indictment) depending on which parts of each distinct theory would make it more convenient to secure convictions against Mr. Smith, although this approach of mashing the offenses together into a hybrid "property/honest services" fraud offense is legally invalid. Consistent with a recent Ninth Circuit opinion reversing fraud convictions, this Court should recognize that "[a]s the government presented the case, it was effectively an honest-services case dressed in the garb of" a defective theory of property fraud. *United States v. Yates*, 16 F.4th 256, 268 (9th Cir. 2021).

The government's charging strategy (and really over-charging strategy) was flawed from the start, and the tactical decision to mis-charge this case as property fraud and derivative money laundering is not the only reason why the jury's verdicts cannot stand. The government also improperly argued uncharged and erroneous theories to the jury while convincing the Court to give defective jury instructions contrary to long-established case law. As discussed in more detail below, the end result of the government's tactics is that acquittals or at least a new trial should be granted on all counts.

¹ "Tr." refers to Transcript and is followed by the specific date of the proceeding. "Doc." refers to the docket entry.

ARGUMENT

I. The Court should grant acquittals on all counts because the government's theory of property fraud was defective; or, the Court should grant a new trial because the prosecutor improperly argued an uncharged honest services theory in summations.

A. Introduction

Because the prosecution of Mr. Smith has gotten to this point through a great deal of obfuscation, the lead issue in this motion seeks to distill the case to a few basic, clear, and controlling legal principles. While the government's evidence had significant holes, the initial Rule 29 claim presented below is meritorious even assuming all of the facts alleged by the government. In other words, the Court can assume that Mr. Smith was a "covered individual" required to disclose a financial interest to obtain HAP payments and failed to do so. The Court can assume that not only did he fail to disclose the interest, but he actively hid the interest through a series of secret transactions and false statements. The Court can further assume that GHURA and HUD would not have issued the HAP payments had they known the hidden and misrepresented facts. And, the Court can assume that those governmental entities have an interest in maintaining their "integrity" and avoiding any appearances of impartiality in the Section 8 program.

The bottom line is that even assuming all of this, the government still did not prove *property* fraud, as the scheme did not deprive the entities of property by cheating them monetarily. The governmental entities paid a fair price for properties rented by deserving Section 8 tenants, and the government did not charge honest services fraud, thereby making interests in "integrity" or impartiality legally irrelevant. Accordingly, the Court should grant judgments of acquittal on all counts, or at least a new trial due to the prosecutor's efforts to mislead the jury with an uncharged honest services fraud theory.

B. The Court should grant judgments of acquittal on all counts

The government's theory of the case as to Counts 1-28 is that Mr. Smith committed *property* fraud because he failed to disclose and hid that he had a conflict of interest under 24 C.F.R. § 982.161 and thereby received HAP payments that he would not have received if he had disclosed the conflict. *See* Tr. 3131-37 (Dec. 3, 2021); Tr. 3481-

1 3487 (Dec. 6, 2021). The government did not prove or even allege in the indictment that
2 GHURA and HUD did not receive the rental units leased or that the price for the units was
3 unfair; in other words, from a monetary or property perspective, GHURA and HUD
4 received what they paid for. Instead, the prosecutor summed up the government's theory
5 as follows: "[W]hat my catchphrase was for the whole case, for the way to think about it
6 was this is about a lawyer who lied so he could keep being a landlord. It really is that
7 simple." RT 3620 (Dec. 6, 2021). It's not that simple. Under a long line of Supreme
8 Court and Ninth Circuit precedent, being a landlord who provides rental properties at a fair
9 price is not property fraud, despite the alleged lies he may have told.

10 The Supreme Court rejected the theory of property fraud alleged against Mr. Smith
11 thirty-five years ago in *McNally v. United States*, 483 U.S. 350 (1987), where the
12 government pursued an essentially identical prosecution. As is the allegation here, the
13 scheme alleged in *McNally* was that local officials hid or failed to disclose that they had a
14 financial interest in a government contract (involving insurance), and had the conflict been
15 disclosed, the contract would not have been awarded.

16 The Supreme Court reversed the defendants' convictions, holding that such a
17 scheme does not constitute *property* fraud because the government did not show "that in
18 the absence of the alleged scheme the Commonwealth would have paid a lower premium
19 or secured better insurance." *Id.* at 360. In other words, while there may have been a
20 hidden and perhaps distasteful conflict of interest that affected how the contract was
21 awarded, the State got what it paid for and therefore was not defrauded of its property
22 rights. The same is true here; the government did not prove or even allege that GHURA
23 and HUD failed to receive Section 8 rental units at a fair price. From a property or
24 financial perspective, they got what they paid for.

25 The Supreme Court recently described *McNally* as limiting the scope of the federal
26 fraud statutes "to the protection of property rights." *Kelly v. United States*, 140 S. Ct.
27 1565, 1571 (2020). Despite the government's theory of the case against Mr. Smith, the
28 statutes do "not authorize federal prosecutors to 'set standards of disclosure and good

1 government for local and state officials.’” *Id.* In short, the government’s theory of
2 property fraud in this case is foreclosed by *McNally*, and this Court need go no further.
3 Nevertheless, in case there were any doubt, an avalanche of post-*McNally* authority also
4 refutes the government’s theory of property fraud in this case.

5 Responding to *McNally*, Congress enacted 18 U.S.C. § 1346, the honest services
6 fraud statute. *See Kelly*, 140 S. Ct. at 1571. In *Skilling v. United States*, 561 U.S. 358
7 (2010), however, the Supreme Court once again rejected the government’s position that
8 federal criminal fraud includes schemes to obtain money by failing to disclose a conflict of
9 interest. Due to constitutional vagueness and other concerns, *Skilling* held that the § 1346
10 offense must be limited to bribery and kickback schemes. *Id.* at 408-09. As part of its
11 holding, the Supreme Court explicitly rejected the government’s request to include
12 “nondisclosure of a conflicting financial interest” as a viable theory of fraud. *Id.* at 409-10.

13 With respect to non-disclosure of conflicts of interest, *Skilling* held that the federal
14 fraud statutes “must exclude this amorphous category of cases.” *Id.* at 410. Among other
15 things, the Court explained that prohibiting a conflict of interest theory of fraud was
16 appropriate because the fraud statutes also serve as predicates for money laundering,
17 thereby allowing prosecutors to overcharge cases (as was done here). *Id.* at 411. Perhaps
18 more importantly, the Supreme Court noted the precise vagueness problems exemplified by
19 the prosecution of Mr. Smith and rhetorically questioned: “How direct or significant does
20 the conflicting financial interest have to be? To what extent does the official action have to
21 further that interest in order to amount to fraud? To whom should the disclosure be made,
22 and what information should it convey?” *Id.* at 411 n.44.² Clarifying the point, the
23 Supreme Court recently described *Skilling* as follows: “We specifically rejected a proposal
24

25 ² To the extent that a nondisclosure of a conflict of interest could support a federal
26 property fraud conviction – and it clearly can’t – the alleged conflict here, which included
27 even “indirect” “prospective” interests of a non-employee who took no direct official action
28 on the subject matter, would not satisfy the constitutional vagueness concerns articulated in
Skilling. For this additional reason, judgment should be arrested on all counts of conviction.

1 to construe the statute as encompassing ‘undisclosed self-dealing by a public official,’ even
2 when he hid financial interests.’” *Kelly*, 140 S. Ct. at 1571.

3 The government presumably recognized that, due to *Skilling*, it could not proceed
4 against Mr. Smith on its failure to disclose a conflict of interest theory pursuant to § 1346,
5 the honest services statute. As a result, it did not charge § 1346 and has instead sought to
6 revert back to § 1343, the property fraud statute, under the theory that was originally
7 rejected in *McNally*. In recently exposing an identical tactic by the government to do an
8 “end-run” around *Skilling*, the Ninth Circuit explained that the Supreme Court did not
9 intend “to let in through the back door the very prosecution theory that it tossed out the
10 front.” *United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) (holding that *McNally*
11 foreclosed the government’s property fraud theory). As the recent opinion in *Kelly*
12 explained, *McNally* is alive and well, and in order to proceed under property fraud, the
13 government had to prove a scheme intended to cause a financial “loss,” such as, for
14 example, a scheme where Mr. Smith intended to have the HAP payments used to pay a
15 family member’s rent rather than for a deserving Section 8 tenant. *Kelly*, 140 S. Ct. at
16 1573 (giving an example of a mayor using city resources “to renovate his daughter’s new
17 home”); see *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (for property fraud,
18 *McNally* requires a “monetary loss” theory).

19 As reflected in the recent *Yates* opinion, the Ninth Circuit has dutifully followed
20 the Supreme Court’s lead, and it has recognized that not every material false statement or
21 omission that causes a victim to part with money or property constitutes property fraud. A
22 good example is *United States v. Bruchhausen*, 977 F.3d 464 (9th Cir. 1992), where the
23 Ninth Circuit reversed wire fraud convictions of a defendant who had used various
24 deceptive practices, including falsely assuring the victims that all of the equipment he
25 purchased would be used domestically when in truth he was shipping it to Soviet Bloc
26 countries. The Ninth Circuit held that the defendant did not defraud the victims of a
27 property right, even though they would not have sold the equipment to him if they had
28 known it would be shipped overseas. *Id.* at 468.

1 *Bruchhausen* analogized to *McNally* and explained: “In *McNally*, government
2 employees purchasing insurance for the state required the seller to share its commissions
3 with other companies in which the government employees had an interest. There was no
4 showing that the state paid more for its policies than it otherwise would have, or that it
5 received less insurance. . . . The Supreme Court reversed, holding that, under such a
6 theory, no ‘property’ had been taken by fraud within the meaning of the mail fraud statute,
7 18 U.S.C. § 1341.” *Id.* This was so even though “[i]n *McNally*, it was doubtless true that
8 the state would not have permitted the policies to be purchased if it had known of the
9 arrangement for sharing of commissions.” *Id.* Again, the same is true here, as the
10 government did not prove or even allege that GHURA paid unfair or excessive fees for the
11 rentals that were provided to the Section 8 tenants; whether GHURA or HUD would not
12 have entered into the HAP contracts if they had known about the alleged conflict is besides
13 the point.

14 As they must, other circuits have also followed *McNally* and the Supreme Court’s
15 subsequent property fraud precedent. Judge Sutton’s opinion for the Sixth Circuit in
16 *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) is a good example. *Sadler* reversed a
17 defendant’s wire fraud conviction for insufficient evidence even though she repeatedly lied
18 to the pharmaceutical distributors who supplied her with prescription pain pills by falsely
19 claiming, among other things, that the drugs were being used to serve “indigent” patients.
20 *Id.* at 590. “Through it all, however, the government never showed that [the defendant]
21 intended to deprive anyone of property. All that the evidence shows is that [the defendant]
22 paid full price for all the drugs she purchased and did so on time. How, then, did [she]
23 deprive the distributors of property?” *Id.* at 590. The government contended in *Sadler* that
24 the defendant “deprived the distributors of their pills[,]” to which the court responded:
25 “Well, yes, in one sense: The pills were gone after the transaction. But paying the going
26 rate for a product does not square with the conventional understanding of ‘deprive.’
27 Stealing the pills would be one thing: paying full price for them is another.” *Id.* “Case law
28 reinforces that the conventional meaning of ‘deprive’ applies in the fraud context. To be

1 guilty of fraud, an offender's 'purpose must be to injure, a common-law root of the federal
2 fraud statutes.' *Id.* (citations omitted). The Sixth Circuit also rejected the government's
3 theory that the distributors would not have sold the pills to the defendant had they known
4 the truth, explaining that such a theory does not constitute property fraud based on
5 *McNally*. *Id.* at 590-91.

6 In sum, the prosecution of Mr. Smith reflects another effort by the government to
7 try an end-run around *McNally* and *Skilling*, no matter how many times the Supreme Court,
8 the Ninth Circuit, and other courts have rejected such a tactic. "As the government
9 presented the case, it was effectively an honest-services case dressed in the garb of" a
10 defective theory of property fraud. *Yates*, 16 F.4th at 268. Given the defective theory, this
11 Court should grant judgments of acquittal on all counts. The invalid theory cannot support
12 the wire fraud charges under 18 U.S.C. §§ 1343 and 1349 in Counts 1-27, *see Kelly*, 140 S.
13 Ct. at 1571 n.1, nor can it support the 18 U.S.C. § 641 charge in Count 28 as the only
14 theory that the government proceeded on was the same defective property fraud theory.
15 *See Kelly*, 140 S. Ct. at 1568 (also overturning property fraud conviction under 18 U.S.C. §
16 666); *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *Yates*, 16 F.4th at 265.
17 Furthermore, due to the insufficiency of the evidence as to all of the underlying counts,
18 judgments of acquittal must also be entered on the derivative money laundering counts
19 (Counts 29, 30, 33-34, 38, and 45). *See, e.g., United States v. Garrido*, 713 F.3d 985, 998-
20 99 (9th Cir. 2013).

21 **C. Alternatively, the Court should grant a new trial**
22 **because the prosecutor argued an uncharged honest**
23 **services fraud theory in summations**

24 Even if the Court somehow finds that the government presented sufficient evidence
25 of property fraud, it still should grant a new trial because the government improperly
26 argued an honest services fraud theory during summations. Again, the government made
27 the tactical decision to charge property fraud, not honest services fraud under § 1346.
28 However, when discussing the elements of the offense at a crucial part of the summations,
the prosecutor argued:

1 They didn't get what they paid for because they got landlord rental services that
2 weren't free of improper influence or an appearance of impropriety. Mike Flores
3 explained why the program integrity matters, right, to encourage the landlords to
4 participate. Mr. Smith and Mr. Wong's conspiracy and scheme cheated GHURA
and HUD out of money and undermined the integrity of the Section 8 Program on
Guam.

5 RT 3479 (Dec. 6, 2021).

6 Thus, the prosecutor made an honest services fraud argument. The problem is that
7 the government did not charge honest services fraud. The Supreme Court recently made
8 clear in *Kelly* that the prosecutor's argument misstates the property fraud offense, as the
9 property fraud statutes do not permit the government "to enforce (its view of) *integrity*"
10 because those statutes "do not 'proscribe schemes to defraud citizens of their intangible
11 rights to honest and impartial government.'" *Kelly*, 140 S. Ct. at 1574 (emphasis added)
12 (quoting *McNally*, 483 U.S. at 3355). "They bar *only* schemes for obtaining property." *Id.*
13 (emphasis added); *see Cleveland*, 531 U.S. at 20-21 (rejecting argument that ensuring
14 "public confidence and trust" is a sufficient interest to sustain a property fraud charge).

15 The prosecutor misstated the law and urged the jury to convict under a legally
16 invalid and uncharged theory, constituting obvious misconduct. *See United States v.*
17 *Flores*, 802 F.3d 1028, 1035-36 (9th Cir. 2015). "[I]t was improper to use the [honest
18 services] lingo in this loose manner when suggesting that such an [interest] was sufficient
19 to warrant a conviction for the crime[s] charged. Doing so misstate[d] the law, because
20 [Mr. Smith] was not charged with" honest services fraud. *Id.* at 1036. The prosecutor's
21 misstatement of the law on this crucial issue violated Mr. Smith's due process rights, *see*
22 *United States v. Velazquez*, 1 F.4th 1132, 1136 (9th Cir. 2021); *Deck v. Jenkins*, 814 F.3d
23 954, 977-78 (9th Cir. 2016), and arguing an uncharged honest services theory constituted a
24 constructive amendment of the indictment. *See United States v. Davis*, 854 F.3d 601, 603-
25 06 (9th Cir. 2017).

26 Thus, even if the evidence were somehow sufficient, the Court should grant a new
27 trial on all counts, as this significant error tainted the underlying offenses and also requires
28 a new trial on the derivative money laundering counts. *See Garrido*, 713 F.3d at 998-99.

1 **II. The Court should order a new trial on all counts because the defective property**
2 **fraud theory based on the HAP payments tainted the jury's general verdict, and the**
3 **prosecutor constructively amended the indictment in his closing argument.**

4 As discussed above, the government failed to prove property fraud, as GHURA
5 received the rental properties that it paid for at a fair price, and therefore judgments of
6 acquittal should be entered on all counts. However, even if a legally sufficient theory of
7 property fraud could somehow be cobbled together from the government's presentation, a
8 new trial would nevertheless be required because the jury's general verdict was certainly
9 tainted by the invalid property fraud theory discussed in the preceding section, which
10 permeated the government's theory of the case at trial. *See Yates*, 16 F.4th at 269;
11 *Garrido*, 713 F.3d at 996-99.³

12 The government may have recognized that its property fraud theory based on the
13 HAP payments was defective, and therefore in one passing comment during summations,
14 the prosecutor argued: "GHURA and HUD didn't get what they paid for. They wanted
15 unbiased legal advice." Tr. 3479 (Dec. 6, 2021). A theory that property fraud was
16 established by the payment of Mr. Smith's legal fees cannot sustain the convictions for
17 numerous reasons. Again, given the general verdict, there is no way to know whether the
18 jury found this theory, as opposed to the defective HAP-payments theory, and therefore at
19 least a new trial on all counts is required. *See Yates*, 16 F.4th at 269; *Garrido*, 713 F.3d at
20 996-98.

21 Moreover, this alternative theory cannot possibly sustain Counts 2-28 because each
22 of those counts specifically alleged HAP payments, not payments for legal fees. Doc. 1
23 (pages 13-15 of the indictment). Even the conspiracy charge in Count 1 specifically
24 alleged that the conspiracy was to obtain HAP payments, not legal fees, Doc. 1 (paragraphs
25 20-21 of the indictment), and there was no evidence that the only alleged co-conspirator,
26 Glenn Wong, had an agreement with Mr. Smith regarding the legal fees, which is

27 ³ The jury returned a general verdict, and the Court overruled the defense's
28 objection that there was no specific unanimity instruction. Tr. 3253-54 (Dec. 3, 2021).

1 undoubtedly why such a conspiracy was not charged. Indeed, when responding to the
2 defense's Rule 29 motion during the trial, the government only argued the HAP payments
3 and never mentioned a legal-fees theory. Tr. 3129-41 (Dec. 3, 2021). To the extent that
4 the legal-fees theory has any validity and could possibly sustain the convictions, even
5 though it was not charged, it constitutes a constructive amendment of the indictment or at
6 least a fatal variance that requires a new trial on all counts. *See Stirone v. United States*,
7 361 U.S. 212, 217-19 (1960); *Davis*, 854 F.3d at 603-06; *United States v. Choy*, 309 F.3d
8 602, 607-08 (9th Cir. 2002).

9 In any event, a property fraud theory based on the legal fees is legally insufficient
10 for numerous reasons. As an initial matter, the theory runs into the same *McNally* problem
11 discussed earlier, as it too is based on a theoretical and potential conflict of interest rather
12 than a property right. Moreover, Mr. Smith was providing legal advice to GHURA, not
13 HUD. GHURA knew that Mr. Smith was a Section 8 landlord before it paid him any legal
14 fees. Knowing that Mr. Smith was receiving HAP payments, GHURA elected to proceed
15 with him as its outside counsel, just as it had similarly proceeded for many years with its
16 prior outside counsel, despite a similar potential conflict, demonstrating that GHURA did
17 not consider HAP payments material to its desires with respect to conflict-free legal advice.
18 *See United States v. Lindsey*, 850 F.3d 1009, 1017 (9th Cir. 2017) ("evidence of the
19 Government's past treatment of a particular requirement is admissible to show that a
20 defendant's violation of that requirement is not material"). Similarly, any type of "salary-
21 maintenance" theory based on the legal fees is insufficient to prove property fraud. *Yates*,
22 16 F.4th at 267.

23 Furthermore, even if Mr. Smith had a conflict of interest prohibiting him from
24 receiving HAP payments under the CFR, the federal regulations do not dictate whether his
25 legal advice to GHURA was tainted by a conflict, which is governed by Guam law. The
26 government did not prove beyond a reasonable doubt that Mr. Smith's legal advice was
27 conflicted under Guam law. To the extent there was a conflict, it was clearly waiveable,
28 and GHURA waived it and did not believe the advice it was receiving was conflicted or

1 “biased.” Certainly, the government did not prove beyond a reasonable doubt that the
2 officials at GHURA who hired Mr. Smith believed that they did not receive the “unbiased”
3 legal advice that they paid for. Indeed, the evidence that he was even actually paid for
4 performing work on Section 8 matters was scant at best and certainly did not satisfy the
5 lofty reasonable doubt standard.

6 In sum, the property fraud theory that was actually charged in the indictment and
7 predominated the presentation at trial was the HAP-funds theory, which was legally
8 deficient; thus, at the very least, a new trial is required on all counts. *See Yates*, 16 F.4th at
9 269; *Garrido*, 713 F.3d at 996-99. A purported legal-fees theory constructively amended
10 the indictment, thereby requiring at least a new trial; in any event, such a theory also
11 cannot support the property fraud offense that was required to sustain the charges.

12 **III. The jury instructions on the requisite intent and an omissions theory of fraud**
13 **were flawed in multiple respects, and the instructions were erroneously one-sided and**
14 **“marshaled” the evidence in favor of the government.**

15 **A. Instruction Nos. 19 and 20 were flawed**

16 Instruction No. 19 told the jury: “The government is not required to prove that the
17 defendant knew that his acts or omissions were unlawful.” Doc. 557. Furthermore,
18 Instruction No. 20 provided:

19 You may find that the defendant acted knowingly if you find beyond a
20 reasonable doubt that the defendant:

- 21 1. was aware of a high probability that *HUD would conclude* he had a
22 conflict of interest, and
- 23 2. deliberately avoided learning the truth.

24 You may not find such knowledge, however, if you find that the defendant
25 actually believed that *HUD would not conclude* that he had a conflict of interest,
26 or if you find that the defendant was simply negligent, careless, or foolish.

27 Doc. 557 (emphases added). The combination of these instructions, given over objections,
28 Tr. 3262-73 (Dec. 3, 2021); Tr. 3332-3346 (Dec. 4, 2021), erroneously described the
critical mens rea element of the offenses.

Despite this Court’s initial (and correct) instinct, Tr. 3331 (Dec. 4, 2021), the
government convinced the Court to give Instruction No. 20 based on arguments that were

1 flat-out wrong, such as that wire fraud and § 641 are not specific intent crimes. Tr. 3333
2 (Dec. 4, 2021). Indeed, the government submitted a brief that was long on hyperbole,
3 asserting that the law supporting its proposed instruction was “obvious,” but short on
4 citations to any relevant authority. Doc. 552.

5 Starting with the basics, the law has been clear for decades that both wire fraud and
6 § 641 are specific intent crimes. *See, e.g., United States v. Sine*, 493 F.3d 1021, 1033 (9th
7 Cir. 2007) (“specific intent [is] required for conviction under the [similarly interpreted]
8 mail fraud statute”); *United States v. Bohonus*, 628 F.2d 1167, 1174 and n.12 (9th Cir.
9 1980) (“Mail fraud is a specific intent crime.”). Ironically, one of the landmark Supreme
10 Court opinions on mens rea and specific intent is a § 641 case. *See Morissette v. United*
11 *States*, 342 U.S. 246 (1952); *United States v. Donato-Morales*, 382 F.3d 42, 47 (1st Cir.
12 2004) (*Morissette* “held that Congress, in codifying the common law crimes described in §
13 641, intended to incorporate the common law requirement of specific intent as an element
14 of the crime”); *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982).

15 Because there is a specific intent element, “good faith belief in legality” provides a
16 defense. *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007) (reversing mail and
17 wire fraud convictions because district court excluded evidence about what outside experts
18 told the defendant about the legality of her scheme). It is for this reason that both the
19 language in Instruction No. 19 stating the government did not have to prove that Mr. Smith
20 knew his omissions were unlawful and the erroneous deliberate ignorance instruction
21 corrupted the requisite mens rea.

22 The Supreme Court has recently emphasized that the maxim “ignorance of the
23 law” is no excuse only “applies where a defendant has the requisite mental state in respect
24 to the elements of the crime but claims to be ‘unaware of the existence of a statute
25 proscribing the conduct.’” *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019) (holding
26 that defendant has to know his prohibited status for felon-in-possession statute). “In
27 contrast, the maxim does not normally apply where a defendant ‘has a mistaken impression
28 concerning the legal effect of some collateral matter and that mistake results in his

1 misunderstanding the full significance of his conduct,’ thereby negating an element of the
2 offense.” *Id.* Thus, “a mistake of law is a defense if the mistake negates the knowledge
3 required to establish a material element of the offense[,]” and “[m]uch of the confusion
4 surrounding the ignorance-of-the-law maxim stems from the ‘failure to distinguish these
5 two quite different situations.’” *Id.*

6 The Ninth Circuit has similarly explained the confusion that the government’s
7 position continues to perpetuate in the very context of § 641, stating that “ignorance of the
8 law” is a defense where the defendant lacks knowledge of the “legal status or condition
9 that is one of the operative facts of the crime.” *Fierros*, 692 F.2d at 1294. The Ninth
10 Circuit used an example of a defendant “charged with embezzlement or theft of federal
11 property in violation of 18 U.S.C. § 641, a crime requiring proof of specific intent.” *Id.* In
12 that instance (which of course is the situation here), it is a defense if the defendant believes
13 his conduct is “legally authorized” because “the mistake of law is for practical purposes a
14 mistake of fact.” *Id.*

15 In this case, Mr. Smith’s legal status as a “covered individual” and the provisions
16 set forth in 24 C.F.R. § 982.161 constituted an operative fact of the crime. Indeed, the
17 Court, at the government’s urging, instructed the jury on the regulation. Doc. 557
18 (Instruction No. 23, discussed more below). Clearly, then, it was error to instruct the jury
19 that the government is not required to prove that the defendant knew that his acts or
20 omissions were unlawful. *See, e.g., United States v. Liu*, 731 F.3d 982, 992-95 (9th Cir.
21 2013).

22 While this was significant error in itself, the deliberate ignorance instruction
23 exacerbated the error. Instruction No. 20 stated that the government only needed to prove
24 that Mr. Smith “was aware of a high probability that *HUD would conclude* he had a
25 conflict of interest” and “deliberately avoided learning the truth.” Doc. 557 (emphasis
26 added). Again, the government’s unsupported arguments in support of this instruction
27 were incorrect. Doc. 552. In a federal criminal case, whether Mr. Smith was a covered
28 individual under the regulation and had a conflict of interest was a question for the jury;

1 the decision was not HUD's, or even a decision for this Court. *See United States v.*
2 *Gaudin*, 515 U.S. 506 (1995) (rejecting government's argument that mixed questions of
3 law and fact, like the materiality element, are not for the jury).⁴ Furthermore, with respect
4 to the specific intent element, the jury was not supposed to determine what Mr. Smith
5 believed HUD would conclude. Rather, the relevant question is what Mr. Smith himself
6 believed in good faith.

7 The Ninth Circuit's decision in *United States v. Smith-Baltiher*, 424 F.3d 913 (9th
8 Cir. 2005) is instructive. The defendant in *Smith-Baltiher* was charged with the specific
9 intent crime of a being a deported alien who attempted to re-enter the country without the
10 authorization of the Attorney General, and the question was how to determine whether the
11 defendant was an alien and whether he had a good faith belief that he was a U.S. citizen so
12 as to defeat the specific intent element of the crime. Like here, an administrative agency
13 (then called the INS) had the authority to determine whether a person is a citizen and
14 subject to deportation, and the INS had previously made those determinations and deported
15 the defendant on four separate occasions (he had also even pled guilty to the same offense
16 on two prior occasions). *Id.* at 916. The government argued that citizenship "is a question
17 to be decided exclusively by the Attorney General, or his designated successor, the
18 Secretary of the Department of Homeland Security, and may not be reviewed by a court,
19 or, even more so, by a jury." *Id.* at 921. Citing cases such as *Gaudin*, the Ninth Circuit
20 firmly disagreed, holding that whether the defendant was a U.S. citizen was a question for
21 the jury. *Id.* at 921-22.

22 Likewise, citing cases like *Fierros*, the Ninth Circuit further held that the defendant

24 ⁴ Even as a civil matter, the ultimate decision regarding the applicability of the
25 regulation is not HUD's, as it is an administrative agency subject to judicial review. *See*
26 *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020) (agency's
27 ethics rules in the CFR are subject to judicial review). While the Court cannot take the
28 question away from the jury under cases like *Gaudin*, it can of course grant a Rule 29 motion
in favor of the defendant. The Court should do so as to the "covered individual" and related
conflict questions in accordance with *Skilling*. *See Skilling*, 561 U.S. at 411 n.44.

1 had the right to present a defense that he believed in good faith that he was a U.S. citizen,
2 regardless of whether he believed that the INS would agree and consent to his entry. *Id.* at
3 923-25. The exact same analysis applies here, demonstrating that the deliberate ignorance
4 instruction was flawed. Not only was Instruction No. 20 simply wrong in this regard, but,
5 as a practical matter, it called for so many levels of speculation that it was
6 unconstitutionally vague. Who at “HUD” was Mr. Smith supposed to speculate would
7 probably find that he had conflict of interest: some official at the regional office, a HUD
8 attorney, the Secretary, a federal judge who would review HUD’s decision? “Who knows.
9 Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard
10 applicable in criminal trials or with the need to express criminal laws in terms ordinary
11 persons can comprehend.” *Burrage v. United States*, 571 U.S. 204, 218 (2014).

12 In sum, Instruction Nos. 19-20 erroneously diluted the critical mens rea element.
13 The government repeatedly emphasized the deliberate ignorance instruction during closing
14 arguments, Tr. 3408, 3478 (Dec. 6, 2021), demonstrating that the instructional error was
15 particularly prejudicial. *See, e.g., United States v. Munguia*, 704 F.3d 596, 604-05 (9th Cir.
16 2012).

17 **B. Instruction No. 29 further undermined the mens rea element**

18 Over objection, Tr. 3299-3308, the Court gave Instruction No. 29 entitled “Proof
19 of Knowledge or Intent” that stated:

20 The intent of a person or the knowledge that a person possesses at any given time
21 may not ordinarily be proved directly because there is no way of directly
22 scrutinizing the workings of the human mind. Because direct proof of knowledge
23 and fraudulent intent of what a person is thinking is almost never available, the
24 state of mind of the defendant may be proved by circumstantial evidence. Intent to
defraud can be inferred from, among other things, efforts to conceal the unlawful
activity, from misrepresentations, from proof of knowledge, and from profits. It
can also be shown if the defendant acted with reckless indifference to the truth or
falsity of his statements.

25 Doc. 557 (Instruction No. 29). This non-pattern instruction was defective for multiple
26 reasons.

27 As an initial matter, it was an improper permissive inference instruction. “A
28 permissive inference instruction allows, but does not require, a jury to infer a specified

1 conclusion if the government proves certain predicate facts. . . . [I]t violates due process ‘if
2 the suggested conclusion is not one that reason and common sense justify in light of the
3 proven facts before the jury.’” *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994)
4 (quoting *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985)). A permissive inference
5 “instruction need not be unconstitutional for [the Ninth Circuit] to find it defective.”
6 *United States v. Rubio-Villareal*, 967 F.2d 294, 297 (9th Cir. 1992) (*en banc*).

7 Thus, *Rubio-Villareal* held, pursuant to supervisory powers, that a permissive
8 inference instruction, “which told the jury it could infer knowledge from two isolated facts
9 – that the defendant was the driver and that cocaine was concealed in the body of the
10 vehicle[,]” was improper. *Id.* at 298. The Ninth Circuit found that the instruction: (1)
11 “implic[d] that the court had ‘prejudged a conclusion which the jury should reach on its
12 own volition[;]’” and (2) “focused the jury on some rather than all the facts” creating “the
13 possibility that a jury may ignore exculpatory evidence.” *Id.* at 299 (citation omitted).

14 Instruction No. 29 violated due process because an intent to defraud could not
15 reasonably be drawn from the facts specified. For example, the fact that a person earns
16 profits does not in any way create an inference of an intent to defraud; if profits were so
17 indicative, all successful entrepreneurs better beware. Likewise, using the alleged
18 misrepresentation itself as an inference of an intent to defraud essentially negates the fact
19 that they are two separate elements of the offense; one could certainly understand why the
20 government would like “to kill two elements with one stone,” but such a desire does not
21 justify a permissive inference instruction. And, the instruction to permit an inference of
22 fraudulent intent from “reckless indifference” again sought to blur the separate elements
23 and was particularly inappropriate without providing a definition of *criminal* recklessness.
24 See *United States v. Rodriguez*, 880 F.3d 1151, 1159-61 (9th Cir. 2018) (reversing based on
25 erroneous recklessness instruction and distinguishing the requisite inferences for criminal
26 and civil recklessness).

27 Even if the instruction did not amount to a constitutional violation, it was improper
28 under *Rubio-Villareal*, as it focused the jury only on the government’s theories of criminal

1 intent, creating the possibility that the jury would ignore the defense evidence. Indeed, “it
2 is the government’s job, not the court’s, to make sure the jury doesn’t draw incorrect
3 inferences.” *United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013). It is not the
4 court’s function to “help” the jurors draw inferences or to “fill[] in the evidentiary gap”
5 that “the government had left in its case.” *Id.* Instruction No. 29 improperly did just that,
6 and the instruction’s excuse for the government’s lack of proof – that knowledge and intent
7 ordinarily may not be proved by direct evidence – is highly questionable.

8 The instruction also erroneously “marshaled” the evidence in the government’s
9 favor. Marshaling “has fallen into widespread disfavor” and “is rarely practiced in federal
10 court.” *United States v. Mundy*, 539 F.3d 154, 158-59 (2d Cir. 2008). “Judges cannot
11 marshal the evidence without exercising their own judgment on how evidence should be
12 described, which aspects should be stressed, which aspects ignored. In doing so, courts
13 inescapably influence the jury on decisions which should be the jury’s sole province.” *Id.*
14 at 158. “In contemporary administration of justice, what conclusions should, or should not
15 be drawn from the evidence are generally left to counsel to argue.” *Id.* at 157. When a
16 party objects to such an inference instruction, it should not be given because any potential
17 benefits do not outweigh the harms. *Id.* In short, the Court should not have given
18 Instruction No. 29 over objection.

19 Furthermore, because the judge’s words exert a tremendous influence on jurors,
20 see *Quercia v. United States*, 289 U.S. 466, 470 (1933), even if a charge like Instruction
21 No. 29 could somehow be given, it at least had to be evenhanded; in other words, it had to
22 cover evidence or theories favorable to the defendant as well as that favorable to the
23 government. See *Starr v. United States*, 153 U.S. 614, 626 (1894) (instruction “if stated at
24 all, should be stated accurately, as well that which makes in favor of a party as that which
25 makes against him”). An instruction cannot “call to the jury’s attention most of the
26 evidence offered by the government” but make no “mention of the evidence adduced by
27 the defense.” *United States v. Dunsmore*, 446 F.2d 1214, 1217-18 (8th Cir. 1971); see
28 *Smith v. Curry*, 580 F.3d 1071, 1083 (9th Cir. 2009) (overturning conviction because

1 instruction “was not neutral by any reasonable standard”); *United States v. Levy*, 578 F.2d
2 896, 903 (2d Cir. 1978).

3 Contrary to this precedent, Instruction No. 29 was erroneously “one-sided.”
4 *Dunsmore*, 446 F.2d at 1217-18. It was entitled “Proof of Knowledge or Intent,”
5 suggesting such proof had been offered. The instruction mentioned “efforts to conceal *the*
6 unlawful activity,” as if unlawful activity had been proven. Most importantly, the
7 instruction focused on the government’s theories demonstrating guilty intent without
8 mentioning any of the defense theories undermining that critical element, nor did it include
9 any language from the typical “good faith” instruction that is given in fraud cases, which
10 was not given here, *see United States v. Amlani*, 111 F.3d 705, 717-18 (9th Cir. 1997), to
11 counter-balance the one-sided charge.

12 In sum, Instruction No. 29 was flawed in multiple respects and was erroneously
13 given. Whether to draw the disputed inference of criminal intent from the government’s
14 factual theories, just like how to evaluate the historical facts, was the province of the jurors.
15 *See Mundy*, 539 F.3d at 157 (“Whether inferences should be drawn from the evidence, and
16 if so, which inferences, are matters of logic and experience — not of law . . . what
17 inferences are suggested, or conclusively established by, the evidence are matters to be
18 argued to the jury by counsel.”).

19 **C. The instructions on omissions and duty to disclose were erroneous**

20 Over objections, Tr. 3247-52 (Dec. 3, 2021), the Court gave instructions on an
21 omissions theory of property fraud and the duty to disclose that were flawed, as they too
22 misstated the law, were worded in a non-neutral manner, and were otherwise confusing.
23 The initial flaw is in Instruction No. 16, which stated: “To find that the defendant omitted
24 material facts, you must find that the defendant had a duty to disclose the omitted facts
25 arising out of 24 C.F.R. § 982.161(a)(2) and the HAP contracts.” Doc. 557.

26 Instruction No. 16 was completely different from the Ninth Circuit model
27 instruction, which states: “To convict a defendant of wire fraud based on omission[s] of
28 material fact[s], you must find that a defendant[s] had a duty to disclose the omitted fact[s]

1 arising out of a relationship of trust. That duty can arise either out of a formal fiduciary
2 relationship, or an informal, trusting relationship in which one party acts for the benefit of
3 another and induces the trusting party to relax the care and vigilance that it would
4 ordinarily exercise.” Ninth Circuit Model Instruction No. 15.35. As the pattern instruction
5 indicates, a relationship of trust creates a duty to disclose, not a contract or regulation. *See*
6 *United States v. Shields*, 844 F.3d 819, 822-23 (9th Cir. 2016).

7 A duty to disclose “may derive from an independent explicit statutory duty created
8 by legislative enactment.” *United States v. Dowling*, 739 F.2d 1445, 1449 (9th Cir. 1984),
9 *rev’d on other grounds*, 473 U.S. 207 (1985). A regulation, however, is not a *statute*
10 enacted by Congress, nor obviously is a contract. Indeed, a civil regulation cannot
11 establish an element of a criminal offense in this context. *See United States v. White Eagle*,
12 721 F.3d 1108, 1114 (9th Cir. 2013); *United States v. Wolf*, 820 F.2d 1499, 1505 (9th Cir.
13 1987). The regulation may permit the government to terminate a HAP contract or perhaps
14 be the basis for a civil lawsuit, but it cannot supply an element of a criminal offense. For
15 this reason alone, the instructions were defective.

16 Furthermore, the wording of Instruction No. 16 was erroneously confusing, as
17 whether Mr. Smith had a duty to disclose is a separate (although related) factual inquiry
18 from whether he in fact failed to disclose material facts. By stating, “duty to disclose *the*
19 *omitted facts*,” the instruction also improperly suggested that Mr. Smith had in fact omitted
20 material facts. This suggestion that Mr. Smith had omitted material facts was repeated in
21 both Instruction Nos. 23 and 24. Instruction No. 23 began: “The defendant had a duty to
22 disclose to GHURA and HUD *the omitted facts concerning his interest or prospective*
23 *interest* under the conflict of interest prohibition provision in” the regulation if he was a
24 covered individual. Doc. 557 (emphasis added). Instruction No. 24 began in a similar
25 fashion. The instructions unfairly suggested that Mr. Smith had indirect or prospective
26 interests and had omitted those facts.

27 Finally, Instruction No. 23 stated that the “duty to disclose applied during the
28 covered individual’s tenure and for one year thereafter.” Doc. 557. While the prohibition

1 on payment may extend to one year after termination of service, nothing in the regulation
2 states that a person has to continue to make disclosures after his service is terminated.

3 **D. Conclusion**

4 Each of these significant jury instructions errors independently merits a new trial,
5 as they were not harmless beyond a reasonable doubt. *See McDonnell v. United States*,
6 136 S. Ct. 2355, 2375 (2016). Certainly, in combination, the errors built on each other and
7 establish that the jury was not given correct legal guidance on the fraud offense, thereby
8 tainting the fairness of Mr. Smith's trial. *See United States v. Preston*, 873 F.3d 829, 835
9 (9th Cir. 2017). Once again, because the underlying offenses cannot be sustained due to the
10 instructional error, the money laundering convictions must also be set aside, *see, e.g.*,
11 *Garrido*, 713 F.3d at 998-99, and thus Mr. Smith should receive a new trial on all counts.

12 **IV. The Court should grant a judgment of acquittal and dismiss Count 28.**

13 **A. Introduction**

14 The Court should grant judgments of acquittal or a new trial on all counts for the
15 numerous reasons discussed above. As set forth below, there are two additional reasons
16 unique to Count 28 requiring an acquittal and dismissal of that count. First, the § 641
17 charge in Count 28 was filed outside of the statute of limitations. Second, the government
18 did not prove a theft of money "of the United States or of any department or agency
19 thereof[.]" 18 U.S.C. § 641, as required under the statute.

20 **B. The § 641 charge in Count 28 was outside the limitations period**

21 The § 641 charge in Count 28 is governed by a 5-year statute of limitations. *See* 18
22 U.S.C. § 3282(a); *United States v. Green*, 897 F.3d 443, 448 (2d Cir. 2018). Despite the
23 allegation in the indictment, § 641 is *not* a continuing offense for statute of limitations
24 purposes under *Toussie v. United States*, 397 U.S. 112 (1970). *See Green*, 897 F.3d at 448-
25 49; *United States v. Yashar*, 166 F.3d 873, 876 (7th Cir. 1999). "The statute of limitations
26 for prosecuting an offense runs from the moment the offense is completed," and, if an
27 offense is not continuing under *Toussie*, then "completion occurs at the moment the
28 defendant's conduct satisfies every element of the offense." *Green*, 897 F.3d at 448. Here,

1 Count 28 alleged a theft as early as March 2011, Doc. 1, and the government specifically
2 asserted at trial that every element of the § 641 offense was satisfied in 2011. Tr. 3344-45
3 (Dec. 4, 2021). The indictment, however, was not returned until March 14, 2017, after the
4 5-year limitations period had expired.

5 The *Yashar* opinion, which considered the related § 666 offense, is directly on
6 point. Like the instant indictment, the government asserted that the theft violation in
7 *Yashar* involved a “continuing course of conduct” that “straddle[d]” the limitations period,
8 and therefore there was “no limitations problem.” *Yashar*, 166 F.3d at 876. The court
9 “reject[ed] this approach as inconsistent with *Toussie* as well as other cases, and as
10 contrary to the purpose of the statute of limitations.” *Id.* at 877. *Yashar* “found little
11 support . . . for the contention that if the government charges a course of conduct as one
12 offense, that offense is not ‘committed’ for limitations purposes until the entire course of
13 conduct is completed.” *Id.*

14 “With this approach, the limitations period would be virtually unbounded. . . . This
15 approach would transform the limitations period from a check on governmental delay in
16 prosecution to a function of prosecutorial discretion.” *Id.* at 879. The “goals” of a statute
17 of limitations “can only be promoted by an interpretation that starts the limitations period
18 when all elements of the crime are first present.” *Id.* In other words, “for offenses that are
19 not continuing offenses under *Toussie*, the offense is committed and the limitations period
20 begins to run once all elements of the offense are established, regardless of whether the
21 defendant continues to engage in criminal conduct.” *Id.* at 879-80.

22 Under cases like *Yashar* and *Green*, § 641 is not a continuing offense for purposes
23 of *Toussie*, regardless of the government’s decision to charge Count 28 as a purportedly
24 continuing course of conduct. The statute of limitations therefore began to run the moment
25 that all elements were first satisfied. Here, the government contends that all elements were
26 first satisfied in 2011, *see* Tr. 3344-45 (Dec. 4, 2021), and thus Count 28, which was filed
27 in 2017, is untimely. The Court should therefore enter an acquittal or arrest judgment and
28 dismiss Count 28. *See Liu*, 731 F.3d at 998.

1 **C. There was insufficient evidence of money “of the United States” for § 641**

2 Section 641 requires the government to prove theft of money “of the United States
3 or of any department or agency thereof” 18 U.S.C. § 641. The government proved
4 that the HAP payments came from GHURA’s bank accounts, and the indictment itself
5 acknowledged that GHURA is “a component of the Government of Guam[,]” Doc. 1, not a
6 department or agency of the United States. Thus, the government failed to prove an
7 element of the § 641 offense, as it failed to prove a theft from a department or agency of
8 the United States.

9 Admittedly, in *United States v. Johnson*, 596 F.2d 842, 844-46 (9th Cir. 1979), the
10 Ninth Circuit held that funds transferred from HUD to a local agency constituted funds “of
11 the United States” if HUD “retains substantial supervision and control over the funds.”
12 While this rule may have supported the government’s approach in this case, the Supreme
13 Court effectively overruled the *Johnson* standard in *Tanner v. United States*, 483 U.S. 107,
14 130-32 (1987).

15 *Tanner* rejected the government’s argument that “substantial ongoing federal
16 supervision” of the transferred funds was sufficient and explained: “Given the immense
17 variety of ways the Federal Government provides financial assistance, and the fact that
18 such assistance is always accompanied by restrictions on its use, the inability of the
19 ‘substantial supervision’ test to provide any real guidance is apparent.” *Id.* at 132. The
20 “substantial supervision” standard would “in effect, substitute[] ‘anyone receiving federal
21 financial assistance and supervision’ for the phrase ‘the United States or any agency
22 thereof[,]’” which is simply not the way the statute is written. *Id.* Since *Tanner*, the
23 Supreme Court has confirmed that the narrow language used by Congress means that funds
24 must be stolen from the federal agency, not from a local agency that receives federal
25 assistance. See *Allison Engine Co. Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 673
26 (2008).

27 Congress used different language in a related statute, § 666, supporting the
28 Supreme Court’s view in *Tanner* that the money or property must actually be taken from

1 the United States, not from a local agency that receives federal funds, no matter how much
2 federal supervision is involved. Section 666 applies to theft offenses if the local
3 “organization, government, or agency receives, in any one year period, benefits in excess
4 of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee,
5 insurance, or other forms of Federal assistance.” 18 U.S.C. § 666(b). If Congress had
6 intended for theft of funds from a local agency receiving federal assistance to fall under §
7 641, it would have used the language that it used in the related § 666 statute. *See Custis v.*
8 *United States*, 511 U.S. 485, 491-92 (1994).

Ironically, the government appeared to recognize that it should have prosecuted under § 666, rather than § 641, and may have intended to do so because paragraph two of the indictment alleged that GHURA “received federal operating subsidies in excess of \$10,000 under an annual contributions contract with HUD.” Doc. 1. The government, however, erroneously proceeded to prosecute under § 641, not § 666, and therefore failed to prove a critical element of the offense. Accordingly, this Court should enter a judgment of acquittal on the § 641 charge in Count 28.

CONCLUSION

17 For the foregoing reasons, the Court should enter an Order granting judgments of
18 acquittal, a new trial, and arresting judgment on all counts.

RESPECTFULLY SUBMITTED this 12th day of April, 2022.

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